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IN THE

Supreme Court of the United States

October Term, 1955

No. 223

VIRGINIA S. BLOCK,

Petitioner,

v.

LOUIS T. BLOCK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

It is the contention of Petitioner that the sole question presented by the record in this cause, and decided by the various Ohio Courts, is the federal question of the improper application of the full faith and credit clause of the United States Constitution, Article IV, Section I, as set forth in the Petition for Certiorari.

Respondent has disputed this, and has alleged that there were both federal and non-federal questions presented to the Ohio Courts, and that "presumably" it could be found that the cause was decided upon the non-federal questions.

It is true that this Court will not review a cause where it appears from the record that the decision of the state court might have been either on a state ground or on a federal

ground, and where it appears that the state ground is sufficient to sustain the judgment. *Williams* v. *Kaiser*, 323 U. S. 471, 1944. Also it is true that there are two well settled exceptions to this rule, viz:

1. "Where the state court does not decide against the petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review." *Indiana, ex rel. Anderson* v. *Brand*, 303 U. S. 95, 1937.

2. "If the independent state ground is not a substantial or sufficient one, 'it will be presumed that the State Court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.'" *Williams* v. *Kaiser*, 323 U. S. 471, 1944.

Applying this rule and its exceptions to the instant cause it is petitioner's contention that:

1. An examination of the record reveals that the *only* question presented to the Supreme Court of Ohio was the Federal question. The Judgment Entry of the Trial Court sustained the motion for judgment on the pleadings and opening statement *on one ground only*, that under the provisions of the full faith and credit clause, the Court was powerless to reform the Illinois decree. The non-federal grounds of failure to tender back and absence of actionable fraud were specifically overruled. (Pet. App. B. 5a, 6a). The Trial Court's Memorandum Opinion, while appended to the Petition for Certiorari as an exhibit (Pet. App. A, 1a), is not a part of the record, and what was stated therein cannot be considered, the Court speaking only through its journal. *State, ex rel. Industrial Commission* v. *Day*, 136 O. S. 477, 26 N. E. (2d) 1014, 1940.

The Plaintiff, petitioner here, thereupon appealed to the Ohio Court of Appeals on the sole ground of full faith and

credit. The defendant, respondent here, did not file a separate appeal as to those non-federal grounds which had been overruled by the Trial Court, although the law of Ohio requires this as a prerequisite to the filing of cross-assignments of error. *Greenberg* v. *Snodgrass Co.*, 95 O. A. 307, 119 N. E. (2d) 114, 1953. Defendant did file cross-assignments of error, under which the non-federal grounds were urged. However, under Section 2505.22, Revised Code of Ohio, such cross-assignments of error are passed upon by the Appellate Court *only* after the Court has concluded to reverse the judgment. *Green* v. *Acacia Mut. Ins. Co.*, 98 O. A. 101 ... N. E. (2d) ..., 1954. In this case the judgment of the Trial Court was affirmed. The Appellate Court therefore did not pass upon these cross-assignments of error, and they are not properly a part of the record in this cause. *Greenberg* v. *Snodgrass Co.*, 95 O. A. 307, 119 N. E. (2d) 114, 1953.

The record further reveals that upon appeal as a matter of right to the Supreme Court of Ohio, the Plaintiff again urged the federal question as her sole basis for appeal. No non-federal grounds were raised by the defendant in the record. Defendant did argue these questions in his brief, but this obviously is not a part of the record.

The record revealing that no non-federal grounds were before either the Court of Appeals or Supreme Court of Ohio, the affirmance by these Courts of the decision of the Trial Court, "must be taken that . . . (they) . . . affirmed the correctness of the decision thus excepted to. . . ." *Nelson* v. *Lagow*, 12 How. 98, 1851, the exception in this case being the federal question of full faith and credit.

2. Any further doubt as to the presence of the federal question is dissipated by closer examination of the two non-federal grounds which respondent claims are involved, under the rule of *Williams* v. *Kaiser*, 323 U. S. 471, 1944.

Neither is adequate to sustain the decision rendered by the Ohio Courts. This is made evident by the judgment entry of the Trial Court, which held:

> "The Court further finds that the other grounds of said motion . . . are not well taken and to that extent said motion is overruled." (Pet. App. B, p. 6a.)

The weight of authority throughout the United States is in accord with the Trial Court's position on both non-federal grounds.

(a) The first non-federal ground urged is that petitioner did not tender back the consideration which she received under the property settlement agreement prior to filing this action for reformation. Cited in support of this ground are cases establishing the rule that in an action for rescission of a contract for fraud, the defrauded party, in order to reestablish the status quo, must first tender the consideration previously received.

This rule, and the cases cited thereunder by respondent, have no application to the instant cause, as was recognized by the Trial Court. The equitable rule within which this case is correctly brought is stated in the following quotation:

> ". . . one who attempts to rescind a transaction on the ground of fraud, mistake or otherwise, is not bound to restore that which he has received by virtue thereof when in any event he is entitled to retain it as indisputably his own, whatever may be the fate of his effort to rescind the transaction." *Williston on Contracts*, Vol. 5, p. 4290.

The logic of this rule is clearly explained in *Galusha* v. *Galusha*, 138 N. Y. 272, 33 N. E. 1062, 1893, where the Court held, in a similar action to set aside a separation agreement:

"The plaintiff cannot be required to restore to the defendant what she may have received as a condition of obtaining the relief which she seeks. The compensation she has received is simply the equivalent of the support which the defendant was legally bound to provide for her while the marriage relation continued, and which he was equitably bound to furnish when it was dissolved because of his infidelity to it. . . . The rule which requires a party seeking to rescind a contract on the ground of fraud or other wrong to restore, or offer to restore, the fruits of it before rescission will be decreed, has no application here. It rests upon equitable considerations which disappear in a case like the present, where nothing has been received, except as a substitute for the discharge of a duty by the adverse contracting party, and from the performance of which he has been absolved during the existence of the contract . . . (If this action is) successful in the pursuit of the relief which it may afford, the court can allow such sum as may be equitable and just from the date of the commencement of this action, and may modify the judgment in the divorce suit accordingly."

To the same effect are the following cases, all involving actions to set aside or *modify* property settlement agreements procured through fraud.

Milekovich v. *Quinn,* 40 Cal. App. 537, 181 P. 256, 1919;
Sime v. *Malouf, et al.,* 95 Cal. App. (2d) 82, 212 P. (2d) 946, 1949;
In Re Estate of Barrow, 27 Cal. App. (2d) 402, 80 P. (2d) 1006, 1938;
Locke-Paddon v. *Locke-Paddon,* 194 Cal. 73, 227 P. 715, 1924;
In Re McNutt's Estate, 36 Cal. App. (2d) 542, 98 P. (2d) 253, 1940.

Respondent attempts to evade the force of this rule by arguing that petitioner is not necessarily entitled to the consideration she received under the property settlement

agreement. This reasoning ignores the fact that respondent has not asserted in the record at any point a challenge to the right of petitioner to alimony, as such, nor has he asserted any right to that sum which she has already received. The dispute is as to the *quantum* of respondent's liability in that *additional* sum fraudulently withheld from the Illinois Court. If petitioner establishes her claim, the amount previously received may be deducted from the total amount found to be due; if she fails, she will be entitled to retain the amount previously received, as the right to this lesser amount is not an issue in this cause.

Tender back is required only under equitable principles to prevent the taking of unfair advantage. It is not required where the ends of justice do not demand it, and where it would be an idle ceremony. It cannot be contended that the Ohio Courts based their decision in this cause on so inadequate a ground.

(b) The second non-federal ground similarly is inadequate. The defendant, respondent here, raised the defense that the amended petition did not state a cause of action because the allegations as to fraud were mere expressions of legal opinion, not misrepresentations of material facts, and did not result in injury to petitioner. A brief recitation of the fraud alleged serves to dispel this illusion.

The essence of the fraud alleged was in the knowledge and concealment of such knowledge by respondent that the trust had been entered into under coercion and undue influence, and that it could be set aside at any time, thus arming respondent with the power to revest himself with the entire corpus, at his pleasure. This knowledge resided in the respondent and his attorney, and was of a material fact, viz., the full nature and extent of his property.

The rule is stated in *3 Freeman on Judgments*, § 1264, page 257:

> "The fraudulent concealment of facts which if known at the trial would have prevented the recovery is always good ground for coming into equity, to obtain relief from a judgment at law."

And in § *1235*, it is said:

> "Where there is a solemn duty to speak, independently of coercion, and in a judicial controversy as well, whether asked to speak or not, and there is a failure to speak, resulting in the enrichment of the wrongdoer and the impoverishment of the one to whom that duty is owing, there is a fraud of the most serious nature, and in a sense both intrinsic and extrinsic."

Examples of cases in which concealment by the husband of the true extent of his worth was held to be material fact, constituting actionable fraud, are:

Eldridge v. *Eldridge*, Texas Civil App., 259 S. W. 209, 1924;
Vragnisan v. *Savings Union Bank & Trust Co.*, 31 Cal. App. 709, 161 P. 507, 1916;
Asher v. *Asher*, 249 Ky. 215, 60 S. W. (2d) 592, 1933;
Miller v. *Miller*, 134 Fla. 725, 184 So. 672, 1938;
Sapp v. *Superior Court*, 119 Cal. App. (2d) 645, 260 P. (2d) 119, 1953;
Milekovich v. *Quinn*, 40 Cal. App. 537, 181 P. 256, 1919.

The very fact constituting the fraud was that petitioner did not know that respondent had been under coercion and undue influence when he signed the trust, or that respondent had been advised that this was sufficient grounds for the setting aside of the trust.

Respondent's duty to speak was clear. Ohio Revised Code, § 3103.05 states:

> "A husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other."

Any agreement entered into between husband and wife must be made with reference to the duty set forth by this section, even though the parties may be separated, and this calls for full disclosure of all facts. *Meyer* v. *Meyer*, 153 O. S. 409, 91 N. E. (2d) 892, 1950. Where such confidential relationship exists, even fraudulent misrepresentations of opinion constitute actionable fraud. *Sime* v. *Malouf*, 95 Cal. App. (2d) 82, 212 P. (2d) 946, 1949.

At the time the settlement agreement was signed, February 27, 1946, petitioner did not know, and had no way of discovering, in view of the concealment by respondent, that the trust was executed under coercion and undue influence. This one fact was the key to the validity or invalidity of this trust, and it was kept from petitioner from the time the trust was signed on October 18, 1945, until June 6, 1950, when this information became public knowledge as a result of respondent's suit to set aside the trust on the ground of undue influence.

Petitioner did suffer damage by reason of this fraud. On the basis of the facts known to her in 1945-46, the Ohio trust was truly irrevocable. The basic rule is stated in 14 *Ohio Jurisprudence*, § 88, page 203:

> "The husband having absolute dominion over his personalty during his lifetime, it has been held that he may, by a bona fide gift inter vivos, deprive his widow of any share in the same; this act constitutes no fraud upon her marital rights, . . ."

cited in *Mark* v. *Mark*, 145 O. S. 301, 61 N. E. (2d) 595, 1945.

If a valid gift inter vivos of personalty is made during estrangement, by the husband, leaving him reduced but sufficient assets to pay to the wife her separate maintenance or alimony, and the gift is bona fide, it is not a fraud on the wife, just as it is not a fraud on any other creditor. See *41 C. J. S.* § *20*, page 418; *Bowlus* v. *Shanabarger*, 19 O. C. C. 137, 1899, and *Holzbeierlein* v. *Holzbeierlein*, 91 F. (2d) 250, C. A., Dist. of Col., 1937.

It is clear that if the husband makes an irrevocable gift of personalty, even when he reserves a life estate unto himself, but retains sufficient assets to support his wife, such a gift is valid and may not be attacked by the wife as a fraud on her marital rights. *Wright* v. *Holmes*, 100 Maine 508, 62 A. 507, 1905.

Petitioner was not mistaken as to the legal effect of this trust on her marital rights, based on the facts at hand. While this trust, on its face, placed the corpus out of the control of respondent, and was irrevocable, it nevertheless provided respondent with an income of $25,000.00 per year, or enough legally to satisfy petitioner's demands for support. Under the law, as long as he kept enough assets to satisfy his creditors, including his wife, in her demand for support, his transfers of the remainder of his assets, if otherwise bona fide, were valid.

This rule is the law in Illinois, as indicated by:

Blankenship v. *Hall*, 233 Ill. 116, 84 N. E. 192, 1908;
Patterson v. *McLenathan*, 296 Ill. 475, 129 N. E. 767, 1921;
Zakroczymski v. *Zakroczymski*, 303 Ill. 264, 135 N. E. 398, 1922;
Geiger v. *Merle*, 360 Ill. 497, 196 N. E. 497, 1935;
Haskell v. *Art Institute of Chicago*, 304 Ill. App. 393, 26 N. E. (2d) 736, 1940;

Hoeffner v. *Hoeffner*, 389 Ill. 253, 59 N. E. (2d) 684, 1945.

It is clear that a fraud on petitioner's marital rights was, in fact, practiced. Respondent had a right to give $970,000.00 away during his lifetime, subject to petitioner's right to support. In such case, petitioner, had she not divorced respondent, would have had no rights, at his death, to this property. The alternative she faced, so she thought at the time of the settlement negotiations, was take support and alimony from his income for his life, or take the $110,000.00 offered.

In reality, respondent had not divested himself of this $970,000 at all, but had merely developed a fraudulent scheme, which, in form, gave the appearance of a bona fide gift. He had control at all times, secure in the knowledge that this trust could be set aside on the ground of coercion and undue influence. Had petitioner shared this knowledge with respondent at the time of the settlement negotiations, she would not have settled for the $110,000 because she would have known that the trust could have been set aside by her, and had she not divorced him, she would have been entitled, at his death, to her distributive share of such fund, a figure far in excess of $110,000. The concealment of this knowledge resulted, as respondent knew it would, in petitioner perforce accepting a greatly reduced and manifestly unequitable sum. Redress for this fraud traditionally is within the power of equity to correct. The Ohio Courts obviously did not base their decisions on this ground.

Neither of the non-federal grounds urged by respondent being adequate or sufficient to support the judgment of the State Court, "it will be presumed that the State Court based its judgment on the law raising the Federal question,

and this Court will then take jurisdiction." *Klinger* v. *Missouri*, 13 Wall, 257, 263, 1871.

Respectfully submitted,

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